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COURT OF APPEALS *11/8/16*
DIVISION II

No. 48458-7-II

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY *Al*
DEPUTY

TED SPICE, an individual,

Appellant

v.

ESTATE OF DORIS MATHEWS

Respondent

RESPONDENT'S RESPONSE TO APPELLANT'S OPENING BRIEF

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A. IDENTITY OF RESPONDENT

The Estate of Doris E. Mathews, through the personal representative of the Estate Donna DuBois, is the Defendant in Pierce County Superior Court case, bearing Cause No. 10-4-00037-5.

B. STATEMENT OF THE CASE

This is a convoluted matter that has been ongoing for many years. This matter essentially begins on December 8, 2009, when Ms. Doris E. Mathews died. Probate commenced on January 8, 2010, and Donna E. DuBois, the decedents daughter, was appointed personal representative of the Estate. *CP 123-125*. Creditor notices were published and sent to creditors on January 13 and 15, 2010. *CP 125*. On April 26, 2010, Mr. Spice filed his first creditor's claim against the Estate for \$8,000,000.00, which was rejected by the Estate on July 7, 2010. *CP 127-130, 132-134; CP 146-147*. Mr. Spice then brought his first lawsuit against the Estate.

i. **Mr. Spice's first lawsuit (Pierce County #10-2-11622-8):**

On August 2, 2010, Mr. Spice filed a lawsuit against "Donna E. DuBois, as personal representative of the Estate of Doris E. Mathews, deceased" under Pierce County Case #10-2-11622-8. *CP 136-149*. The Complaint was amended on July 28, 2011. *CP 150-167*. The allegations in the Amended Complaint are broad and include claims for breach of a promissory note contract, conversion by the Estate of personal property

belonging to Mr. Spice and Plexus Investment LLC, tortious interference with business expectancies by the Estate, breach of fiduciary duties by Ms. Doris Mathews as a member of Plexus Investments LLC, waste of estate assets by the Estate, improper use of Plexus Investment LLC operating capital, and other claims. *Id.*

A jury trial was held and a verdict entered on September 12, 2012, with a Judgment and Order Quieting Title entered on October 5, 2012, and Findings and Conclusions of Law entered on October 8, 2012. *CP 169-183*. The jury verdict included a determination of the interests in various pieces of real property between Mr. Spice and the Estate. *CP 169-170*. There was no finding of waste, breach of contract, conversion, tortious interference or other claims made by Mr. Spice for himself or related to Plexus Investment LLC. *Id.*

Mr. Spice appealed that decision to the Court of Appeals, Division II under Appellate Case No. 44101-2-II. Mr. Spice challenged the verdict. On March 1, 2016, the Court of Appeals issued an unpublished opinion regarding that appeal, affirmed the trial court's orders, and denied Mr. Spice's appeal. *Ex. 1*.

ii. Mr. Spice's second and third lawsuit (Pierce County 13-2-09885-2; 13-2-09887-9: Consolidated into: 10-4-00037-5):

In 2013, after the jury verdict, and well after any applicable creditor deadlines and other relevant statute of limitations, Mr. Spice filed new creditor claims against the Estate on his own behalf and as the assignee of alleged claims by others, which claims were denied by the Estate. *CP 185-226*. Mr. Spice then filed a lawsuit against the "Estate of Doris E. Mathews", on his own claim (Pierce County Case #13-2-09885-2) and on one of the claims assigned to him by Jeffrey Payne (Pierce County Case #13-2-09887-9), seeking in excess of \$2,000,000.00. *CP 228-239*. The two lawsuits were ultimately consolidated into the probate matter (Pierce County Case #10-4-00037-5).

The Estate brought a motion for Summary Judgment that was granted and from which Mr. Spice brought this appeal.

iii. Estate's Motion for Summary Judgment:

The Estate's motion for summary judgment sought dismissal of all claims by Mr. Spice individually and as assignee of claims of Jeffery Payne. *CP 106-119*. Mr. Spice responded to the motion disputing that claims should be dismissed. *CP 270-281*.

The trial court heard oral argument and found no disputed issues of material fact, and dismissed all claims brought by Mr. Spice, including the

assigned claims of Mr. Payne. *CP 338-340*. On October 30, 2015, the Court entered an Order Granting Summary Judgment which dismissed all claims by Mr. Spice. *CP 338-340*.

iv. Mr. Spice's Motion for Reconsideration:

On November 9, 2015, Mr. Spice brought a motion for reconsideration relying upon Civil Rule 59 and asking the court to allow submission of additional evidence. *CP 341-509*. In the reconsideration, Mr. Spice submitted dozens of pages of new exhibits, offered another Declaration and exhibits (CP 510-557), a declaration of his attorney (CP 558-618), and a Declaration of Norma Woods (CP 622-635). Mr. Spice limited the reconsideration to the following issues: a) mismanagement claims against the estate, b) waste claims against the Estate, c) damages from expending funds to repair damage to co-owned properties. *CP 341*. A response was filed by the Estate at the request of the court. *CP 636-640*. The court denied the motion for reconsideration (CP 791) and did not allow additional evidence.

v. City of Puyallup litigation and appeal:

In Mr. Spices' Declaration filed in response to the motion for summary judgment at issue here, he makes reference to litigation against the City of Puyallup. That is another lawsuit (Pierce County Superior Court Case #07-2-11635-0) that Mr. Spice brought on behalf of himself,

Doris Matthews prior to her death, and Plexus Development, LLC, which appears to be a different entity than Plexus Investments LLC referred to in this lawsuit. The Estate was dismissed from that matter. Mr. Spice appealed a judgment against him and Plexus Development LLC to this Court under Case #45476-9-II, which is still pending.

C. ARGUMENT

1. The Motion for Reconsideration was appropriately denied.

“Motions for reconsideration are addressed to the sound discretion of the trial court, a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of that discretion.” *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wash.App 896, 906, 977 P.2d 639 (1999). “A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *Id.*”

a. The motion for reconsideration was untimely.

A motion for reconsideration “shall be filed not later than 10 days after the entry of the judgment, order, or other decision.” *Civil Rule 59(b)*. In this case, the Summary Judgment Order was entered on October 30, 2015, and the reconsideration had to be filed no later than November 9, 2015.

"The motion shall be noted at the time it is filed...". *Id.* The courts business hours are, "8:30 a.m. to 4:30 p.m." *PCLR 0.2(a)(1)*. Washington Court General Rule 30(c)(1) provides, "An electronic document is filed when it is received by the clerk's designated computer during the clerk's business hours; otherwise the document is considered filed at the beginning of the next business day."

Pierce County filing rules are consistent with the General Rule. The Pierce County FAQ for E-Filing states, "Can I e-file anytime, including weekends and holidays? Yes. The LINX application is available for use anytime on any day. However, documents submitted after 4:30 pm Monday through Friday, or on weekends and holidays, will be considered filed on the next regular court day." "When will my document(s) be considered "Filed" with the Clerk's Office? If a document is submitted outside of normal business hours, it will be considered "filed" at 8:30 am the following regular court day." "Are there file size limits for e-filed documents? No, there are no file size limits."

The "Note for Motion Docket" and "Declaration of Ted Spice in Support of Motion for Reconsideration" were not filed until November 10, 2015, as shown on the courts time stamp, the eleventh day after the Court's Order granting summary judgment. *CP 643-645*. The Motion

was not received by Patrick Hanis until after court hours at 4:47 pm on November 9, 2015, with supporting documents received at 5:02, 5:04 and 5:06 pm. *CP 646*.

The filing deadline is not discretionary and provides that a motion for reconsideration "shall" be filed within ten days. *In re Marriage of Harshman*, the court found, "The 5-day time requirement [then the deadline in place] stated in CR 59(b) is intended to set the maximum time within which a motion for reconsideration and/or a new trial must be made." *18 Wash. App. 116, 120, 567 P.2d 667 (1977)*. "The time may not be extended." *Griffin v. Draper, 32 Wash.App. 611, 613, 649 P.2d 123 (1982)*.

The written order was filed on October 30, 2015, and the reconsideration was not fully filed until November 10, 2015. The trial court did not extend the time for filing and it was appropriately denied.

b. The appeal is not timely.

This appeal by Mr. Spice was not filed until January 14, 2016, more than seventy-six days after the Order Granting Summary Judgment was entered on October 30, 2015. *CP 782, 338*. The appeal of that Order is untimely. Mr. Spice relies upon the appeal deadline having started on December 21, 2015, when the Order Denying Motion for Reconsideration was entered. *CP 791*.

Because the motion for reconsideration was not timely, the appeal was not timely brought. In *Griffin v. Draper*, a motion for reconsideration was brought more than ten months after entry of judgment. 32 *Wash.App* 611, 649 *P.2d* 123 (1982). The court found that a late filed motion for reconsideration does not “bring forward the original judgment for review because the appeal is more than 30 days from the judgment.” *Id.* at 614.

c. The motion for reconsideration did not satisfy the requirements of Civil Rule 59.

Mr. Spice’s motion for reconsideration of the summary judgment attempted to add new declarations and documents. *CP* 341-635. Civil Rule 59(a) sets forth specific grounds upon which a motion for reconsideration may be granted. Generally, those grounds include: irregularity in the proceeding, misconduct of prevailing party, accident or surprise, newly discovered evidence, excessive damages, error in the assessment of the amount of recovery, no evidence or reasonable inference to justify the decision, error in law, or that substantial justice has not been done.

Mr. Spice did not identify any grounds upon which he asserts that the Order granting summary judgment should have been reconsidered. “In asking the trial court to reconsider its ruling, the

litigant must 'identify the specific reasons in fact and law as to each ground on which the motion is based.'" *Fishburn, v. Pierce County Planning and Land Services Dept.*, 161 Wash.App. 452, 473, 250 P.3d 146 (2011).

Mr. Spice argued in support of his reconsideration request, "The Court determined that a lack of evidentiary support" to support Mr. Spice's claims, and that "Although Spice maintains the factual basis for those claims was adequately presented and summarized previously, he takes this opportunity to present further evidence." CP 342, ln 8. Essentially, Mr. Spice argued that since he lost the summary judgment motion, he should have an opportunity to present additional evidence that was already under his control. This is not a proper ground for reconsideration under Civil Rule 59.

Mr. Spice argues on appeal that the trial court should have considered the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), before denying the request for additional declarations as part of the motion for reconsideration. *Appellants opening brief*, pg. 49. That case, as well as *Keck v. Collins*, address a courts decision to exclude evidence due to violations of discovery orders and refusal to allow late submitted declarations prior to a summary judgment motion. Here, the trial court did allow a late

submission of declaration by Mr. Spice (CP 333-334), and a declaration of Norma Woods (CP 336-337) before oral argument.

The *Burnet* factors don't apply to a motion for reconsideration. If "the evidence was available but not offered until after the opportunity passed, the party is not entitled to submit the evidence." *Fishburn, Id.*, citing, *Wagner Dev., Inc. v. Fid. & Deposit Co.*, 95 Wash.App.896, 907, 977 P.2d 639 (1999). "The realization that the first declaration was insufficient does not qualify the second declaration as newly discovered evidence." *Adams v. Western Host, Inc.*, 55 Wash. App. 601, 608, 779 P.2d 281 (1989). "Motions for reconsideration and the taking of additional evidence, therefore, are within the discretion of the trial court." *Chen v. State*, 86 Wn. App. 183, 191-92, 937 P.2d 612 (1997); see also *Ghaffari v. Department of Licensing*, 62 Wash. App. 870, 816 P.2d 66 (1991).

The trial court appropriately denied the motion for reconsideration, and did not consider the additional declarations of Ted Spice, Jonathan Baner, and Norma Woods filed with that motion. The trial court did not abuse its discretion.

2. Summary judgment was appropriately granted.

The trial court appropriately reviewed the pleadings, declarations, exhibits, and heard oral argument of counsel before granting summary judgment.

a. Summary Judgment Standard.

The purpose of summary judgment is to avoid a useless trial. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12, 721 P.2d 1 (1986). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). But the existence of a material fact cannot be hypothetical. "The adverse party must set forth specific facts showing there is a genuine issue for trial or have the summary judgment, if appropriate, entered against them." *Seven Gables*. 106 Wn.2d at 12-13. "An appellate court may affirm the trial court's decision on any ground supported by the record." *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

b. Appellate standard and record on review.

The well-established standard of appellate review of a summary judgment order is de novo and the court engages in the same inquiry as the trial court. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wash. App. 41, 58-59, 316 P.3d 1119 (2014). RAP 9.12 provides in part that on “review of an order granting or denying a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court.”

The Estate’s motion for summary judgment (CP 106-119) was supported by the Declaration of Donna Dubois, personal representative (CP 253-269), and Patrick Hanis (CP 120-252), as well as its Reply (CP 327-332). Mr. Spice’s response (CP 270-281) relied upon his own Declaration (CP 282-321), and a declaration of Jeffery Payne (CP322-326). After the Estate filed its Reply, Mr. Spice offered an additional Declaration (CP 333-334), and a declaration of Norma Woods (CP 336-337). While those two additional declarations were untimely, the court considered those. The record on review is limited to the foregoing briefs, declarations and exhibits submitted as part of the summary judgment and considered by the trial court.

The additional declarations and exhibits offered by Mr. Spice in his reconsideration request and denied by the trial court, should not be

reviewed as part of the appeal. Those are the declarations of Ted (CP 510-557), Jonathan Baner (CP 558-618) and Norma Woods (CP 622-635).

3. Plexus Investment LLC should not be added as a party, and any such claims are barred by res judicata and are untimely.

Plexus Investment LLC is not a party in the instant lawsuit. In the first lawsuit, Mr. Spice raised claims related to Plexus Investment LLC that he apparently now wants to renew in this lawsuit. *CP 179-184*. The standard of review for failing to join a party is abuse of discretion. *Gildon v. Simon Property Group, Inc.*, 158 Wash.2d 483 (2006). The trial court appropriately did not allow vacation of the voluntarily dismissal of complaints by Mr. Spice on behalf of Plexus Investment LLC.

a. The claims are barred by res judicata.

In Mr. Spice's opening brief, he states the desire to add Plexus Investment LLC in order to make claims that the "Estate misappropriated 'partnership funds... and unlawfully converting Plexus' operating capital... took out several credit cards, business and personal loans in the name of Plexus Investments LLC, misused funds, and never repaid any of the funds they had taken from the LLC." *Appellant's Opening Brief*, page 24-25.

These are the same claims raised in the Amended Complaint from the first lawsuit that resulted in a jury trial, appealed, and a ruling issued

against Mr. Spice. *CP 150-167, Ex. 1*. For example, Mr. Spice alleged, “Mr. Spice and Ms. Mathews formed Plexus Investments, LLC (“Plexus”) in April 2004, and signed an Operating Agreement April 22, 2004”; asserts various-claims of damage, mismanagement and financial harm, and waste by the Estate; claims that Mr. Spice incurred personal costs and expenses as a result of the estate's actions; “Doris Mathews spent large sums of Plexus operating capital on herself, family, strangers, and other associates.”; “Ms. Mathews as a member of Plexus, owed Mr. Spice fiduciary duties. Ms. Mathews breached her fiduciary duties to Mr. Spice, by spending large sum of operating capital on her family and however she saw fit.”; and, the “Estate and Ms. DuBois, as personal representative, owe Mr. Spice, a creditor of the Estate, the fiduciary duty not to waste assets of the Estate, and the duty of good faith and fair dealing.” *CP 152-155, sections for example 3.5, 3.6, 3.9-3.11, 3.15*.

Res judicata, or claim preclusion, prohibits the re-litigation of claims and issues that were litigated, or could have been litigated in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887 P.2d 898 (1995). Res judicata applies to bar claims when there is the same 1) subject matter, 2) claim or cause of action, 3) persons and parties, and 4) the quality of the persons for or against whom the claim is made. *Pederson v. Potter*, 103 Wash. App. 62, 11 P.3d 833 (2000).

A plaintiff cannot avoid the res judicata effect of an unfavorable judgment by re-filing the same claim based upon a different theory of recovery. *Sound Built Homes, Inc. v. Windermere Real Estate South, Inc.*, 118 Wash. App. 617, 72 P.3d 788 (2003).

The Plexus issue was clearly part of the first lawsuit. The trial court in the first lawsuit found in part, that Mr. Spice's claims were:

"high risk to begin with based on the lack of any contemporary accounting which was done throughout Mr. Spice's involvement in this case, lack of best business practices for an attempted multi-million dollar development, and the fact that there were literally hundreds of thousands of dollars unaccounted for during the course of this project." CP 179.

"The Court further finds that Mr. Spice, when he initially met Ms. Mathews, was on Section 8 housing, was dependent upon Social Security Disability for income, and had little or no prior experience in being a project manager/developer of a commercial warehouse facility and/or cancer treatment center as testified to during trial." CP 180.

"The Court further finds that Mr. Spice would have had no independent ability to pay any attorney's fees, except for funds that he would have received through the various mortgages and refinances of the property that were originally owned by Doris E. Mathews and was later transferred to Plexus, LLC". CP 180.

All claims by Mr. Spice related to Plexus Investment LLC are barred by res judicata and the court did not abuse its discretion in refusing to allow Mr. Spice to assert claims related to the LLC.

b. Plexus Investment LLC is not a proper party.

Ownership of the properties and the other claims by Mr. Spice were resolved in the jury trial which order was confirmed on appeal by this Court. *Ex. 1.* At no point in time was Plexus Investment LLC found to be an owner of the real properties despite Mr. Spice making Plexus Investment LLC a core component of his Amended Complaint in the first lawsuit. In fact, the Court of Appeals, Division II, referenced the Plexus Investment LLC operating agreement and the trial court's ruling "that the jury could have concluded that 'the operating agreement was a fraud, that any of the transfers were a fraud or misrepresented to [Mathews], that Mr. Spice may have taken more cash and [the jury] offset that amount toward anything he might be claiming in the property.'" *Ex. 1.* The Court of Appeals, Division II, also made findings related to the Plexus Operating Agreement and whether it had any impact as to the awarding of attorneys fees and costs. *Ex. 1.*

This is simply an effort by Mr. Spice to find a new party through which to bring claims that he previously lost. It should also be noted that at no time did Mr. Spice bring a motion to the court to add Plexus Investment LLC as a party to this lawsuit as required by Civil Rule 14.

c. The claims by Mr. Spice related to Plexus Investment LLC are untimely.

Even if claims by Plexus Investment LLC were allowed, and if such claims even exist, those claims are untimely. RCW 25.15.130(1) provides: "A person ceases to be a member of a limited liability company, and the person or its successors in interest attains the status of an assignee as set forth in RCW 25.15.250(2), upon the occurrence of one or more of the following events: (a) the member dies". RCW 25.15.250(2) states, "Unless otherwise provided in a limited liability company agreement: (a) An assignment entitled the assignee to share in such profits and losses, to receive such distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned; and (b) A member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of his or her limited liability company interest."

Mr. Spice argues that the Plexus Operating Agreement applies. Again, that same Operating Agreement was addressed in the first jury trial. In addition, that Operating Agreement was not submitted by Mr. Spice as part of the summary judgment motion and is not part of the record on appeal.

Doris Mathews ceased being a member of Plexus on the date of her death on December 8, 2009. The estate had no obligations to the LLC after that date, including no obligation to pay any of the costs

claimed by Mr. Spice and for which he offers no evidence. Under RCW 11.40.051, any claim to contribution must have been brought no later than two years after the date of death at the latest, or within four months after the date of death under the creditor notice statute. Even if an obligation to contribute existed, Mr. Spice offered no evidence to support that claim in response to the summary judgment motion.

If Plexus Investment LLC had some plausible claim against the Estate in the past, the creditor filing periods ended years ago.

4. The Estate did not commit waste or mismanage properties.

Mr. Spice failed to submit exhibits or facts to support his claim for waste or mismanagement. *CP 282-321*. He provides no evidence of damage, lost rent, improper rentals, or missing monies, to support his broad claims of mismanagement and waste. Rather, his Declaration in response to the summary judgment motions predominately rehashes old arguments from the jury trial, and seeks millions of dollars for wages and other damages he claims- all of which were dismissed on summary judgment and which Mr. Spice did not appeal.

a. The Estate did not commit waste:

One result of the jury trial was that there were co-owned pieces of real property by Mr. Spice and the Estate. In his Complaint, Mr. Spice alleges that the Estate is liable for damages of lost revenue, improper

management, and water damage. Each of those claims fail as a matter of law.

The facts are undisputed that Mr. Spice managed the properties himself until October 2012. *CP 229*. Mr. Spice agrees that SJC Property Management managed the properties by no later than January 1, 2013 through March 31, 2014, when it resigned. *CP 241, 253*. After SJC Property Management resigned on March 31, 2014, the Estate took over the management until February 6, 2015, when the court ordered appointment of a professional property manager which ultimately occurred. *CP 253, CP 82*.

On or about April 3, 2014, Donna DuBois, the personal representative of the Estate, discovered significant damage caused by a burst water pipe at one of the properties. *Id.* This discovery was just three days after the professional property manager, SJC Property Management, resigned on March 31, 2014. *CP 253, CP 241*. At the time the damage occurred, insurance was in place and the property was being managed by SJC Property Management. *CP 253*.

It is unclear why Mr. Spice thinks the Estate is responsible for the water damage. He argues that the property had a water leak “for 13 months prior” to its discovery and that the damage was so “extensive it ruined the kitchen and apparently the foundation as well.” *CP 85*.

According to Mr. Spice's own declaration, the damage occurred throughout the time the property was being managed professionally by SJC Property Management. *CP* 85.

The trial court found Mr. Spice presented, "No evidence I see that the estate was involved in the management when that [leak] occurred." *RP*, October 16, 2015, pg 38, ln. 19-25, pg. 39 ln. 1-2. The claim to the insurance company to remedy the damage was denied. *CP* 253.

Mr. Spice argues that the Estate owes him a duty as if he's a beneficiary of the Estate. Mr. Spice relies upon RCW 11.48.020 to suggest an obligation that the Estate keep the co-owned property in "tenantable repair" for his benefit. *Appellant's Opening Brief*, pg. 30. That statute provides the right of a personal representation to "immediate possession of all the real as well as personal estate of the deceased", to receive the deceased share of "rents and profits", and to "keep in tenantable repair all houses, buildings and fixtures thereon, which are under his or her control." That statute applies only to the interest of the Estate and its beneficiaries, which Mr. Spice is not, and does not compel a duty of an estate to benefit a co-tenant. RCW 11.48.020 creates no statutory duty owed by the Estate to Mr. Spice.

b. No mismanagement or misappropriation occurred.

To support his assertion of mismanagement and misappropriation, Mr. Spice offers his own unsupported declaration without admissible documents or evidence to back his claims. In those claims, he asserts “SJC and the DuBois failed” to maintain garbage, water, electric, mortgage, collect deposits, and other items and noted complaints from tenants in January and February 2013. *CP 282-321*.

The Estate was not managing the properties during this time period, and SJC was the professional property manager appointed by court order. If Mr. Spice had an issue with the property management at that time, his dispute was with SJC, not the Estate. Further, there was no obligation of the Estate to be responsible for property management if SJC failed in its obligations, and Mr. Spice offers no evidence of a duty of the Estate for such responsibility. Under Mr. Spice’s reasoning, the Estate could sue him for waste, mismanagement, lack of tenants, non-payment of utilities, mortgage, etc., since he didn’t take action on the same concerns he claims.

Mr. Spice relies upon a “report that summarized all of Spice’s claims” allegedly prepared by Norma Woods. *Appellant’s opening brief, page 10*. Yet, Mr. Spice did not offer a declaration of Ms. Wood in response to the summary judgment to support any report. Mr. Spice submitted the report under his own declaration, but without supporting documents to overcome evidence issues of foundation and hearsay. In fact, that report appears to have been created by Mr. Spice himself but

submitted as if it was created by Ms. Woods, which is perhaps why she didn't include it with her declaration. For example, the report includes a statement of, "Loss of interest in Kitsap property due to having to give Paul Pasyuk my share..." which is the share of Mr. Spice. *CP 305*.

The report makes legal conclusions about an "Estate obligation to Ted Spice" in arriving at a claim for \$351,313.22. *Appellant's opening brief, pg. 10*. Yet, neither the report, or Mr. Spice, offer any documents, legal argument, or other basis to support its calculations of alleged monies due. For example, it suggests an Estate obligation to pay \$62,500 for "\$125,000 Loan from Doretha Spice Estate", but no loan or other document is included. *CP 300*. It includes a statement of attorneys fees Mr. Spice apparently believes the Estate owed in the amount of \$81,803.33, yet there is no order of attorneys fees against the Estate in favor of Mr. Spice. *CP 305*. The trial court found that there was no evidence that the estate hadn't accounted for monies under its control, and Mr. Spice did not submit any such records. *RP October 16, 2015, pg. 39, ln. 9-18*.

Mr. Spice's declaration contains unsupported allegations, lacks documents, and includes a hearsay document by Norma Woods alleging some sort of "estate obligation to Mr. Spice" without any supporting documents or detail. *CP 306*. Many of the exhibits Mr. Spice offers appear to have been created by him, including one document from December 2010, made shortly after he filed his first lawsuit, all barred by res judicata. *CP 315*.

The Declaration of Mr. Spice, with the documents he submitted, do not create a material issue of fact and summary judgment was properly granted. The existence of a material fact cannot be hypothetical. "The adverse party must set forth specific facts showing there is a genuine issue for trial or have the summary judgment, if appropriate, entered against them." *Seven Gables. 106 Wn.2d at 12-13.*

c. The Estate did not commit waste as to mortgage debt.

Mr. Spices claims that the estate, "it is believed" is attempting to increase mortgage debt to make the estate insolvent. *Appellant's Opening Brief, pg. 36.* A mere allegation of "belief" is not sufficient to support a material issue of fact.

It is sadly ironic that Mr. Spice's claim is actually due to his own actions in creating mortgages against the properties. This was addressed in the first lawsuit. In that lawsuit, findings of fact and conclusions of law were entered, and the trial court found,

The Court further finds that Mr. Spice would have had no independent ability to pay any attorney's fees, except for funds that he would have received through the various mortgages and refinances of the property that were originally owned by Doris E.

Mathews and was later transferred to Plexus, LLC.

CP 179-180. The court further found that Mr. Spice's legal counsel in the first lawsuit was likely paid by mortgage money, "based on the lack of accounting [by Mr. Spice] for the hundreds of thousands of dollars

which were obtained through the mortgage of Ms. Mathews' separate property and to this day remains unaccounted." *Id.*

The issues related to mortgages on the property stem from the actions of Mr. Spice himself and were addressed in the first lawsuit. These claims are barred by res judicata. In addition, Mr. Spice offers no actual evidence or basis in law to support his claim that the Estate is liable to him for any increase in mortgage debt, which mortgages were created by the actions of Mr. Spice and for which he did not account for hundreds of thousands of dollars resulting from those loans. *CP 179-180.*

d. The continuance request was properly denied.

Despite Mr. Spice's misappropriation claims in his ongoing conspiracy theory against the Estate, the Estate has not misappropriated funds and he was given more than sufficient time to investigate his claims. Mr. Spice filed his lawsuits on June 5, 2013, and the summary judgment was not decided until October 30, 2015, with trial scheduled to begin on February 2, 2016, after prior continuances.

During that time, Mr. Spice had access to discovery produced by the Estate with court oversight, especially during the time frame of February 6, 2015, (CP 82) through June 24, 2015 (CP 102), bankruptcy records (CP 96), and records from court appointed property management companies. The Estate complied with those court orders and the trial court did not find the Estate acted inappropriately despite multiple

motions by Mr. Spice related to the accounting that resulted in the foregoing orders.

Despite the significant period of time, and despite having received the records ordered by the trial court, Mr. Spice failed to produce any evidence of wrongdoing by the Estate in response to the summary judgment. In fact, Mr. Spice had additional documents he elected not to submit in response to the summary judgment motion, which he tried to submit as part of the reconsideration, and that he is now trying to rely upon in this appeal. The court appropriately denied the request, and Mr. Spice must live with the decision he made.

Mr. Spice had over two years between commencement of his lawsuit and the summary judgment to develop facts to support his claims, and he failed to do so. The trial court did not abuse its discretion in denying the continuance request by Mr. Spice, or in finding that he failed to present any evidence of misappropriation by the Estate.

5. There is no valid claim for property taxes.

Mr. Spice does not have a claim against the Estate for alleged property taxes for a piece of property in Kitsap County and Mr. Spice offered no proof of payment of property taxes for the Kitsap County property. The Estate has an independent interest in the property and can decide for itself whether or not to pay such tax. There is no independent

cause of action to require the Estate to reimburse Mr. Spice for any taxes he may have paid. Further, if applicable, Mr. Spice may have a remedy under RCW 84.64.060 by a lien against the property for any taxes paid.

6. The Estate is entitled to an award of attorneys fees and costs.

The Estate requests an award of attorneys fees and costs as allowed by RAP Title 18.1. RCW 11.96A.150 provides in part, "any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party... The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate".

The trial court awarded the Estate attorneys fees and costs against Mr. Spice in the amount of \$30,000.00 pursuant to RCW 11.96A.150. *CP 793-794*. The trial court noted that Mr. Spice did not prevail on any of his claims, fees incurred were "due to the litigious action of Ted Spice", and the Estate successfully defended each of the claims by Mr. Spice. *Id.* The court also took into consideration that "Ted Spice prevailed on some motions so the fee award takes into consideration an offset for those motions." *Id.*

“The award of attorney fees under this statute [referring to RCW 11.96.140 (repealed), now RCW 11.96A.150] is discretionary and will not be overturned absent a clear showing of abuse of discretion.” *Laue v. Estate of Elder*, 106 Wash. App 699, 712, 25 P.3d 1032 (2001). In *Laue v. Estate of Elder*, the court found that claims by a partner against the estate of a deceased partner for monies owed fell within the estate statute allowing discretion of a court to award attorneys fees. *ID. at 713*. The court reasoned that even if the suit “is an ordinary civil lawsuit in which there is no provision for prevailing party attorneys fees” such a “suit directly affected the administration of the Estate” and an award of attorneys fees was not an abuse of discretion. *Id.*

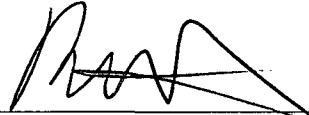
The trial court took into consideration many factors in awarding attorneys fees. The court noted that Mr. Spice had at least seven different attorneys throughout his various claims against the Estate, and the history “is very confusing” requiring significant work in defending against the claims. *RP, January 8, 2016, pg. 3*. The court found that the Estate prevailed in dismissing the claims brought by Mr. Spice, including claims he brought as an alleged creditor of the Estate, as well as claims he asserted directly against the Estate.

D. CONCLUSION

Civil Rule 1 provides that the civil rules “shall be construed and administered to secure the just, speedy and inexpensive determination of every action.” “Litigation is not intended to be a life-long activity with litigants returning endlessly to our courts.” *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 513, 933 P.2d 1036 (1997), dissent. Mr. Spice has been endlessly litigating this matter since shortly after the death of Ms. Mathew on December 8, 2009. He has not been satisfied with the outcome all along the way and it’s time for this to end. Mr. Spice failed to support his claims in response to the summary judgment motion despite years of litigation, discovery, court orders, jury trial, and numerous attorneys. His appeal should be denied and the Estate should be awarded attorneys fees and costs on appeal.

Respectfully submitted this 18th day of November, 2016.

HANIS IRVINE PROTHERO, PLLC



Patrick M. Hanis, WSBA No. 31440
Attorneys for Respondent, Donna DuBois,
personal representative of the Estate of
Doris E. Mathews

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I sent a true copy of this document, as follows:

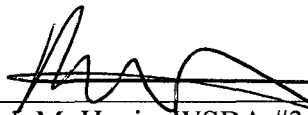
Court of Appeals
Division II
Court Clerk
950 Broadway, Suite 300
Tacoma, Washington 98402-4454

(VIA EMAIL ONLY: coa2filings@courts.wa.gov;
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Jonathan Baner

(VIA EMAIL ONLY: johnathan@banerbaner.com;
assistant@banerbaner.com)

DATED this 18th day of November, 2016, at Kent, Washington.



Patrick M. Hanis, WSBA #31440

March 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE,

Appellant,

v.

DONNA E. DUBOIS, as personal
representative for the Estate of DORIS E.
MATHEWS, deceased,

Respondents.

No. 44101-2-II

UNPUBLISHED OPINION

WORSWICK, J. — Ted Spice appeals the trial court's denials of his requests for attorney fees, judgment notwithstanding the verdict, and a new trial. After a jury trial regarding a breach of contract claim and numerous counterclaims, the jury returned a verdict that distributed several parcels of real property between Spice and the estate of Doris Mathews. Spice argues that the trial court erred by (1) designating the estate as the prevailing party, and therefore finding that Spice was not entitled to attorney fees under two contracts between Spice and Mathews, and (2) not granting Spice's motion for judgment as a matter of law or a new trial. We hold that neither party was the prevailing party and that Spice did not preserve his other issues for appeal. Consequently, we affirm the trial court's orders.

Exhibit 1

FACTS

Ted Spice met Doris Mathews in 2003 when he became her tenant. Mathews owned several rental properties, which had fallen into disrepair. Spice began to help Mathews maintain and manage the properties.

In January 2004, Mathews issued a promissory note to Spice agreeing to pay half of “all equity or monies realized in any amounts ranging from \$5,000 up to \$8,000,000 from property sales, investments, developments, refinancing proceeds or any type of business projects whatsoever relating to any properties purchased, bonds relating to” several of Mathews’s properties,¹ “including all property or investments, property purchases or any other business project coordinated by the grantor now or transacted in the future.” Ex. 4. As collateral, the promissory note identified “all future investments and properties purchase [sic], deeds, deeds of trust, contract, mortgages, developments, current investments, projects including interest monies or deeds held in” the same properties. Ex. 4. The promissory note contained an attorney fee provision, which entitled Spice to reasonable attorney fees in the event he sued to collect on the note.

In February 2004, Spice obtained a durable power of attorney over Mathews. In April 2004, Spice and Mathews together formed a real estate development company called Plexus Investments, LLC (Plexus). Spice held a 51 percent interest in Plexus, and Mathews held a 49 percent interest. Mathews and Spice signed a Plexus Operating Agreement governing the company. This operating agreement also included an attorney fee provision for reasonable

¹ The properties were 11003 58th St. Ct. E., 11010 58th St. Ct. E., 5818 Milwaukee Ave. E., and 10915-10917 58th St. Ct. E.

attorney fees to the substantially prevailing party in any dispute “arising out of the terms of this Agreement or the Members’ relationship or a suit or action permitted herein.” Ex. 6 at 19.

Both Spice and Mathews actively participated in Plexus. But Spice did not keep a detailed accounting for Plexus beyond using bank statements and taxes, and sometimes he and Mathews withdrew money from Plexus accounts at casinos. Both Spice and Mathews used Plexus money for personal expenditures. The casino withdrawals alone totaled over \$400,000, and additional unidentified withdrawals from Plexus accounts totaled several hundred thousand dollars.

Several property transfers are at issue in this case.

- Between 2007 and 2009, Mathews granted Spice quitclaim deeds to 11003 58th St. Ct. E and 11319 58th St. Ct. E.
- In 2004, Spice granted Plexus a quitclaim deed to a property in Napavine.
- Between 2007 and 2008, Mathews granted Plexus a quitclaim deed to 5818 Milwaukee Ave. E. and 11305 58th St. Ct. E.
- In 2008, Mathews granted herself, Spice, and Paul Pasyuk a quitclaim deed to 11305 58th St. Ct. E.
- In 2009,² Plexus granted Spice quitclaim deeds to 5818 Milwaukee Ave. E., 10915-10917 59th St. Ct. E, and a parcel in Kitsap County.

In addition, the ownership of 11010 58th St. Ct. E. was at issue: it was listed in the promissory note, but it appears that Mathews never conveyed it to Plexus or Spice.

In December 2009, Mathews died. Spice filed a creditor’s claim against her estate alleging that he was owed \$8,000,000 under the promissory note. Mathews’s estate rejected this claim in full. Spice then filed suit against the estate alleging breach of contract. Spice later amended his complaint to allege conversion, tortious interference, breach of fiduciary duty, and

² These transfers occurred after Mathews’s death.

frivolous litigation. Spice's suit relied only on the promissory note, not on the Plexus Operating Agreement, to establish breach of contract.

The estate filed 25 counterclaims, including fraud, undue influence, breach of fiduciary duties, wrongful death, and other claims regarding Spice's relationship with Mathews. One of these counterclaims was a quiet title action concerning the properties discussed above. The trial court dismissed the counterclaim for wrongful death on summary judgment, but the remaining 24 counterclaims proceeded to trial.

Spice moved in limine to exclude certain character evidence including "who parks at [Spice's] home" and "who stays at [Spice's] home." Clerk's Papers (CP) at 683-84. The trial court granted this motion.

The case proceeded to a jury trial, during which witnesses testified about Spice's and Mathews's relationship and business dealings. At trial, the estate's counsel asked a witness about who visited Spice at his home, and the witness responded: "Boys. Lots and lots of young boys." 4 Verbatim Report of Proceedings (VRP) at 435. The trial court sustained Spice's objection, and at a sidebar conference, the trial court contemplated whether a mistrial was appropriate. The court found that the witness's "tone and inflection" raised an "obvious inference as to Mr. Spice's sexual orientation and actual misconduct on the part of Mr. Spice." 4 VRP at 439. The court also found that the witness anticipated the question and that it was asked in such a way so as to evade the order in limine regarding character evidence. The court said that either a mistrial or individual questioning of jurors would be an appropriate remedy. Spice refused the offer to declare a mistrial. Instead, the trial court questioned each juror individually about whether he or she noticed the innuendo in the question and answer, and, if so, whether the

juror could still be fair. The trial court satisfied itself that each juror could provide a fair verdict. Upon Spice's request, the trial court later found the estate's counsel in contempt for violating the order in limine.

Instead of asking the jury to issue special verdicts regarding each claim and counterclaim, the parties and the court had the jury present its verdict in the form of distributing the properties at issue in the case. The jury found that neither Spice nor the estate was entitled to all right title and interest in the properties. Instead, the jury distributed the property as follows:

- 11003, 11004, 11007,³ and 11011⁴ 58th St. Ct. E: 25 percent to Spice, 75 percent to the estate.
- Napavine property:⁵ 100 percent to Spice.
- 5818 #A and #B Milwaukee Ave E.⁶: 100 percent to the estate.
- 11305 58th St. E.⁷: 100 percent to the estate.
- 11319 58th St. E.⁸: 100 percent to Spice.
- 10915-10917 58th St.⁹: 100 percent to the estate.
- Kitsap County acreage: 50 percent to Spice, 50 percent to the estate.

³ The market value of the triplex at 11003 was roughly \$610,000. It is unclear from the record whether the triplex includes 11004 and 11007.

⁴ This may be a scrivener's error; the record elsewhere refers only to 11010 58th St.

⁵ The record does not appear to contain value estimates for the Kitsap County acreage or the Napavine property.

⁶ The market value of this property was roughly \$269,000.

⁷ The market value of this property was roughly \$250,000.

⁸ The market value of this property was roughly \$325,000.

⁹ The market value of this property was roughly \$225,000.

After the jury's verdict, Spice moved for judgment as a matter of law or a new trial under CRs 49, 50, and 59. He argued that judgment as a matter of law or a new trial was appropriate because there was not sufficient evidence to support the jury's verdict. At a hearing on this motion, Spice's attorney told the court, "[W]e're not asking for a new trial." VRP (Oct. 5, 2012) at 3-4. Instead, Spice said he wanted the court to revise the jury's verdict as a judgment as a matter of law.

The trial court denied Spice's motion for judgment as a matter of law or a new trial. It noted that the case was complex and that it was difficult to know on what basis the jury made its decision, because there were no special verdict forms about specific claims or documents. But the court explained that the jury must have decided not to rule in Spice's favor because there were "hundreds of thousands of dollars of monies that were unaccounted for," and the defense had posited that legal documents between the parties were unfairly or even fraudulently favorable to Spice. VRP (Oct. 5, 2012) at 11. It referred to the testimony about transfers of money and concluded that the jury could have concluded that "the operating agreement[] was a fraud, that any of the transfers were a fraud or misrepresented to [Mathews], that Mr. Spice may have taken more cash and [the jury] offset that amount toward anything he might be claiming in the property." VRP (Oct. 5, 2012) at 12. It denied the motion for judgment as a matter of law or a new trial, concluding that the jury had considered conflicting evidence and the credibility of the witnesses and distributed the properties accordingly.

Spice moved for reasonable attorney fees pursuant to the promissory note and the Plexus Operating Agreement, arguing that he was the substantially prevailing party. The estate also moved for reasonable attorney fees as the substantially prevailing party under the promissory

note. The trial court denied reasonable attorney fees to both parties. Regarding Spice, the trial court found that he was not the substantially prevailing party, after considering the “values of the properties and the amount of interest in the real property” that the estate received. CP at 1225. The court also rejected Spice’s argument that he was the substantially prevailing party for having defended against the estate’s numerous affirmative defenses and counterclaims.

Turning to the estate’s request for attorney fees, the trial court found that the estate was the substantially prevailing party. But the trial court denied the estate’s request for reasonable attorney fees because of the estate’s “excessive motion and litigation practice and ineffective use of court time,” as well as the delays caused by the estate’s counsel’s inexperience. CP at 1227.

The court also wrote:

This Court also repeats its finding that it has serious questions regarding the legality of the documents upon which both parties are relying on with regard to their contractual source of the reasonable attorney’s fees request; specifically, a promissory note and the Plexus, LLC, operating agreement. Although no specific jury instruction was requested to make a finding as to whether or not those documents were in fact credible, the Court can only infer, from the decision of the jury which weighed heavily in the ultimate result in favor of the Estate of Doris E. Mathews, that they also shared those questions regarding the legality of said documents.

CP at 1227. The trial court concluded that an award of statutory attorney fees and costs only was appropriate based on the estate counsel’s lack of experience, counsel’s excessive motions, and the number of baseless counterclaims and affirmative defenses.

Accordingly, the trial court entered the following relevant conclusions of law: that Spice was not the prevailing party, and that the estate receive only statutory fees and costs. The court

wrote that it did not “believe there is a contractual basis to award fees [to the estate].” CP at 1228. Spice appeals.¹⁰

ANALYSIS

I. ATTORNEY FEES

Spice argues that the trial court erred by denying his request for attorney fees. He argues primarily that he was the substantially prevailing party.¹¹ We hold that Spice was not entitled to attorney fees because neither party was the substantially prevailing party.¹²

A. *Standard of Review*

We generally engage in a two-step process to review a trial court’s denial of attorney fees. *State v. AU Optronics Corp.*, 180 Wn. App. 903, 913, 328 P.3d 919 (2014). First, we review de novo whether a statute, contract, or equity provides a basis for the award of attorney fees. *AU Optronics*, 180 Wn. App. at 913. Where, as here, the award of attorney fees depends on a determination of who substantially prevailed, we review the trial court’s determination of who is the substantially prevailing party de novo. *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011). Second, we review the trial court’s decision to award attorney fees, as well as

¹⁰ The estate does not appeal the trial court’s decision to not award the estate’s reasonable attorney fees under the promissory note.

¹¹ As a threshold matter, the estate argues that we should deem the trial court’s findings of fact about attorney fees verities on appeal because Spice failed to include these findings verbatim in his brief as required by RAP 10.4(c). Spice does include the material portions of the findings of fact in his brief, and we exercise our discretion to consider his argument on the merits.

¹² Spice and the estate argue the validity and applicability of the attorney fee provisions in the promissory note and Plexus Operating Agreement. Because we affirm the trial court’s finding that Spice did not substantially prevail, we do not address these arguments.

the reasonableness of the amount, for an abuse of discretion. *AU Optronics*, 180 Wn. App. at 913. A trial court abuses its discretion when its decision is unreasonable, based on untenable grounds, or made for untenable reasons. *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014).

B. *Substantially Prevailing Party*

Spice argues that he was the substantially prevailing party, and therefore he deserved reasonable attorney fees under the promissory note and the Plexus Operating Agreement. We disagree because neither party substantially prevailed. Thus, the trial court did not abuse its discretion by denying Spice's request for attorney fees because he was not a substantially prevailing party.

Under RCW 4.84.330, the prevailing party in a contract dispute is entitled to attorney fees incurred to enforce the contract, so long as the contract specifically provides for attorney fees to either party. Here, the promissory note provides for reasonable attorney fees in the event of default, and the Plexus Operating Agreement provides for attorney fees to the substantially prevailing party.

"The substantially prevailing party need not prevail on his or her entire claim." *Hawkins*, 166 Wn. App. at 10. Determining which party substantially prevailed depends on the relief granted. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 783, 275 P.3d 339 (2012). If "both parties are awarded relief, the net affirmative judgment may determine the prevailing party." *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996). However, the net affirmative judgment method may not be appropriate where a party receives affirmative judgment on just a few claims. *Phillips*, 81 Wn. App. at 702. Alternatively, where multiple and

distinct claims were at issue, the trial court should take a “proportionality approach.” *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605 (1993), *overruled on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490, 200 P.3d 683 (2009).

But if both parties are awarded “some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees” and both parties will pay their own costs and fees.¹³ *Phillips*, 81 Wn. App. at 702. For example, in *Hertz v. Riebe*, the plaintiffs succeeded on their breach of contract claim and the defendants succeeded on their collections claim. 86 Wn. App. 102, 104-05, 936 P.2d 24 (1997). The court held that because both parties prevailed on major issues, neither party was entitled to attorney fees. *Hertz*, 86 Wn. App. at 105-06.

Here, neither party substantially prevailed because both parties were afforded some measure of relief. *Hertz*, 86 Wn. App. at 105-06; *Phillips*, 81 Wn. App. at 702. The many issues at trial involved whether the estate breached the promissory note, whether the estate committed conversion, tortious interference, or breach of fiduciary duty, and whether Spice committed any of the torts and contract violations alleged in the 25 counterclaims. But the jury provided its verdict in the form of distributing property. It found that neither Spice nor the estate was entitled to all right and interest in the properties, instead dividing them as follows: Spice received 100 percent of two of the properties, the estate received 100 percent of four of the properties, and the

¹³ The estate does not argue that neither party substantially prevailed, but Spice admits that this would be the case if we hold that both parties prevailed on major issues.

parties shared interest in the remaining properties. Thus, both parties were awarded significant portions of the properties, and neither party clearly prevailed over the other.

Spice argues that we should deem him the prevailing party because he prevailed against all of the estate's counterclaims. We disagree: the jury provided a verdict in the form of distributing property only. It is inappropriate to attempt to look behind the jury's distribution of property to divine what claims or counterclaims they believed had been proved. We do not inquire into the jury's process. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003). Thus, there is no basis upon which we can determine how many claims on which each party prevailed.

Moreover, Spice provides no authority for the proposition that a party substantially prevails by prevailing on numerically more claims or counterclaims. Where a party cites no authority for a proposition, we may assume that the party has unsuccessfully searched for such authority. *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 376-77 n.3, 337 P.3d 364 (2014), *review denied*, 182 Wn. 2d 1023 (2015). In other words, there is no support for the notion that we should determine that Spice substantially prevailed merely because he defended against 24 counterclaims, even if the record supported the notion that the jury found that he defended all those counterclaims.

Spice argues in the alternative that we should award both parties proportional attorney fees because both prevailed on major issues. A proportional award of attorney fees is sometimes appropriate when each party prevails on distinct and severable claims. *See Marassi*, 71 Wn. App. at 915. But as stated above, it is impossible to know which claims each party prevailed on.

Thus, in this circumstance, it is appropriate that each party bear its own costs and fees, because neither party substantially prevailed. *See Phillips Bldg. Co.*, 81 Wn. App. at 702.

Because neither party substantially prevailed, the trial court did not abuse its discretion by denying attorney fees to Spice.¹⁴ As stated above, Spice received less than half of the properties. And as the trial court noted, it is inappropriate for Spice to attempt to determine how many of the counterclaims he won. Thus, the trial court had tenable grounds and reasons for ruling that Spice, as a nonprevailing party, should not receive attorney fees. *See Cook*, 180 Wn. App. at 375.

II. POST-TRIAL MOTIONS

Spice argues that the trial court erred by denying his motions for judgment as a matter of law or a new trial.¹⁵ We disagree.

A. *Judgment as a Matter of Law Issue Not Preserved*

CR 50(b) governs post-verdict motions for judgments as a matter of law. Such a motion is proper when the court can find, as a matter of law, that there was no substantial evidence or reasonable inference to sustain a verdict for a nonmoving party. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). But a party loses the opportunity to make a motion for judgment as a matter of law if it fails to move for a directed verdict under CR 50(a)

¹⁴ The trial court found that the estate was the substantially prevailing party. This finding does not affect the analysis in this case because the trial court ultimately denied the estate's request for reasonable attorney fees on other grounds, and the estate does not appeal this determination.

¹⁵ After the jury verdict, Spice simultaneously moved for judgment under CRs 49, 50, and 59. He appeals the trial court's adverse ruling for judgment as a matter of law under CR 50(b) and a new trial under CR 59.

before the case is submitted to a jury. *Gorman v. Pierce County*, 176 Wn. App. 63, 86, 307 P.3d 795 (2013), *review denied*, 179 Wn.2d 1010 (2014); *see* CR 50(b).

Spice concedes he requested the judgment as a matter of law only after the verdict came back from the jury, without previously having made a motion for a directed verdict. Thus, Spice failed to preserve his judgment as a matter of law issue, and this claim fails.

B. *Motion for New Trial Issue Not Preserved*

Spice appears to argue that the trial court erred by denying his motion for a new trial because the evidence did not support the jury's verdict and because the estate's attorney committed misconduct. We hold that Spice is not entitled to a new trial on either basis because he failed to preserve either issue for appeal.

1. *Request for New Trial Issue Not Preserved*

Spice's written motion in the trial court appeared to request a judgment as a matter of law and a new trial in the alternative, but at the hearing on Spice's motion, his counsel said: "[W]e're not asking for a new trial." VRP (Oct. 5, 2012) at 3-4. Instead, he said he was requesting the trial court to *alter* the jury's verdict. Because Spice did not request or argue why he was entitled to a new trial below, he has not preserved this issue on appeal and we decline to consider it. RAP 2.5. Additionally, because Spice told the trial court he was not seeking a new trial, the trial court did not rule on his request for a new trial. Thus, there is no ruling for us to review.

2. *Misconduct Argument Not Preserved on Appeal*

Spice also argues that he deserved a new trial under CR 59 because of the misconduct of the estate's counsel. Spice failed to preserve this issue for appeal for two reasons.

First, Spice did not argue to the trial court that opposing party misconduct required a new trial. He argued only that the jury verdict was unsupported and should be altered. Because we review the trial court's ruling on a motion for a new trial for an abuse of discretion, we generally review only those grounds argued to the trial court. *See* RAP 2.5.

Second, Spice refused the trial court's offer to declare a mistrial after a witness appeared to raise an inappropriate innuendo about Spice's sexuality. A party waives the right to request a new trial based on misconduct if it declines a mistrial on the same basis. *Estate of Lapping v. Grp. Health Co-Op. of Puget Sound*, 77 Wn. App. 612, 619-21, 892 P.2d 1116 (1995). Thus, Spice has waived the right to a new trial due to misconduct because he declined a mistrial when the misconduct occurred.

ATTORNEY FEES ON APPEAL

Both Spice and the estate request attorney fees on appeal. We grant the estate's request.

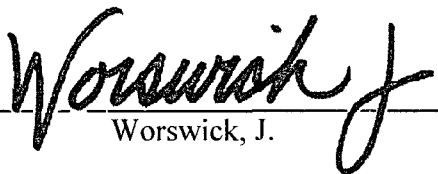
Spice argues that he is entitled to attorney fees under RCW 4.84.330, which permits attorney fees to the prevailing party under a contractual agreement. But because Spice is not the prevailing party on appeal, he is not entitled to attorney fees on appeal.

Similarly, the estate requests attorney fees on appeal under RCW 4.84.330, pursuant to the attorney fee provision in the promissory note. Because we hold in the estate's favor on appeal, RCW 4.84.330 entitles the estate to reasonable attorney fees on appeal to be set by the commissioner of this court upon compliance with RAP 18.1(d).

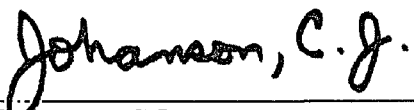
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Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Johanson, C.J.


Maxa, J.